Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT W. WILDBERGER, JR.
Petitioner,
v
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 228 AND LOCAL 2532.
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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64 pp

PETITIONER'S STATEMENT OF ISSUES

Petitioner intends to raise the following issues:

1. Was Petitioner's request for default judgement constitutionally and properly denied, though Respondent (AFGE) failed to respond to the complaint within the time frame prescribed in Rule 12(a), and in accordance with the Court's Order dated January 22, 1993?

2. May an **untimely** counterclaim be considered by the Superior Court, to the detriment of Petitioner's interests?

3. Does the denial of Petitioner's request for default judgment violate his right of due process under the Fifth Amendment to the U.S. Constitution, and his right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution?

4. Does the Court's consideration or entertainment of Respondent's **untimely** counterclaim violate Petitioner's right of due process under the Fifth Amendment to the U.S. Constitution, and Petitioner's right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution?

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 228 AND LOCAL 2532.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Robert W. Wildberger, Jr., respectfully prays that a Writ Of Certiorari be issued to review the judgement and opinion in this case of the Court of Appeals for the District of Columbia entered on January 22, 1993, and the order denying a rehearing entered on April 18, 1994.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

Parties who have appeared below include:

For the Petitioner (Appellant):
Mr. Robert W. Wildberger, Jr.
5679 Saffron Lane
Woodbridge, VA 22193

For the American Federation
of Government Employees (AFGE),
Council 228 and Local 2532,
Respondents: Mark Roth and Charles A. Hobbie
American Federation of
Government Employees
80 F St., N.W.
Washington, D.C. 20001

B. RULINGS UNDER REVIEW

The rulings under review include an Order dated April 18, 1994, from the District of Columbia Court of Appeals, that denied Petitioner's request for rehearing, and additional request for rehearing en banc. (Appendix, at

A-5 - A-8). On May 4, 1994, Petitioner filed a Motion To Stay Mandate (Appendix, at A-12 - A-13), which was denied by the lower court on May 13, 1994. (Appendix, at A-14 - A-15). This Petition is filed within ninety (90) days of the denial of the Petition For Rehearing on April 18, 1994.

C. RELATED CASES

To the best of Petitioner's knowledge and belief, there are no related cases in this Court.

SUMMARY OF ARGUMENT

The Respondent did not respond in the lower court, to the Petitioner's complaint within the time frame prescribed in Rule 12(a), and defied the related Court's Order dated January 22, 1993. Furthermore, the Respondent did not request an extension of time to respond to the complaint, as provided in Superior Court Rules of Civil Procedure (SCR Civ) 55(a). Similarly, the Respondent's counterclaim against Petitioner was untimely filed, and Petitioner should not be required to defend against an untimely counter-claim. To deny the default judgment and/or to require Petitioner to defend against an untimely counterclaim would violate Petitioner's rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Accordingly, Petitioner is entitled to as relief:

1. A default judgment against the Respondent, AFGE, in the amount of $84,028, with interest and costs; and

2. A dismissal with prejudice of Respondent's **untimely** counterclaim against Petitioner.

Alternatively, the lower court should be directed to hear Petitioner's claim that he is entitled to a default judgment, and his claim that he should not be required to defend against an untimely countercalim. The Writ should issue to remedy this unfair situation, and to create order in a chaotic judicial system involving the Superior Court of the District of Columbia.

REASONS FOR ALLOWANCE OF THE WRIT

A. STATEMENT OF FACTS

On January 22, 1993, Plaintiff (Petitioner), Robert W. Wildberger, Jr., filed a complaint against Respondent, Council 228 and Local 2532 of the American Federation of Government Employees (AFGE). The complaint alleged:

> "1. Jurisdiction of this Court is founded on D.C. Code Annotated, 1973 edition, as amended, Sec. 11-921.
>
> 2. Plaintiff, Robert W. Wildberger, Jr. is and was at all times hereafter mentioned, domiciled in and a resident of the State of Virginia, at 5679 Saffron Lane, Woodbridge, Virginia 22193.
>
> 3. Upon information and belief, defendant American Federation of Government employees (AFGE) Local 2532 and Council 228, is an unincorporated association domiciled in the District of Columbia, with a principal of business located at 409 3rd St., S.W., Washington, D.C. 20416.
>
> 4. Upon information and belief, Mr. Clendon Terry is Acting President of AFGE Local 2532 and Council 228.

5. Upon information and belief, Mr. Clendon Terry is Agent for service of process upon AFGE, Local 2532 and Council 228.

6. Between the years of 1986 and up to and including about September of 1991, Plaintiff was President of AFGE, Local 2532.

7. Between the years 1987 and up to and including about March of 1989, Plaintiff was the President, AFGE Council 228.

8. During Plaintiff's presidency of AFGE Council 228 and Local 2532, said Council was placed in trusteeship by National AFGE, effectively cutting off the source of Council access to funds. This unlawful conduct of National AFGE additionally impaired the funding of Local 2532 and resulted in the de facto cessation of Plaintiff's ability to furnish fair representation to bargaining unit members.

9. To negate and forestall Plaintiff and other officers of AFGE Council 228 and Local 2532 being charged with a breach of duty of fair representation to bargaining unit members, Plaintiff advanced his personal funds to and for the exclusive benefit of AFGE Council 228 and Local 2532. This advancement of funds was approved by the membership of AFGE 2532 by proper documentation and resolutions.

Said funds advanced by Plaintiff and all expenditures were audited and approved by an AFGE Local 2532 audit

committee that included Clendon Terry. Said funds advanced by Plaintiff and all expenditures were further audited and approved by the National Office of AFGE.

10. Between the years of 1987 and 1990, Plaintiff advanced to AFGE Local 2532 his personal funds and expenses in the amount of $85,128. Plaintiff made these advancements by borrowing from banking and credit sources, an insurance company, from savings and income, and by the liquidation of an Individual Retirement Account (IRA). It was agreed between Plaintiff and Defendant AFGE Local 2532 that the funds were to be repaid as funding permitted.

11. Plaintiff verified under oath said sums and expenses advanced AFGE Local 2532 by filing with the U.S. Department of Labor an annual report entitled "Labor Organization Annual Report." This report was filed by AFGE Local 2532 for the years 1987, 1988, 1989, and 1990. The report is mandated and required by the Labor-Management Reporting and Disclosure Act of 1959, as amended, and Title VII of the Civil Service Reform Act.

12. The original outstanding balance was $85,128. Payments in the amount of $1,100 have been made on this account.

13. The amount advanced as of December of 1990, is $84,028. This amount is still due and owing, as of January of 1993.

14. Demand for the amount owing has been made and the same refused by the Defendant after extensive negotiation. Additional demand for the amount owing has been made and the same refused by the parent affiliation of the Defendant, National Office of the American Federation of Government Employees (AFGE), John Sturdivant, President; and the AFL-CIO, Lane Kirkland, President.

15. By refusing payment for the amount owing, Defendant has materially and substantially breached the contract and obligation that exists between the parties.

16. As a result of the breach of contract and obligation existing between the parties, Plaintiff has sustained material, substantial and irreparable damages.

Wherefore, premises considered, Plaintiff demands judgment against Defendant in the amount of Eighty Four Thousand, Twenty Eight Dollars ($84,028), with interest, attorney's fees, costs and such other and further relief that the nature of this cause, the facts and the Court may require."

The date the complaint was filed, January 22, 1993, the Court, through Chief Judge Fred B. Ugast, issued an Initial Order (cited as Order hereinafter) and assigned the case to Judge Robert I. Richter (Appendix, at A-1 - A-4).

Paragraph (2) of the Order provided that Petitioner's complaint would be dismissed if Defendant was not served a copy of the complaint within 60 days of the filing of the complaint, unless the time for serving the Defendant has been extended "as provided in SCR Civ 4(j)." However, with respect to Defendant (Respondent), the Order also provided at paragraph (3):

> (3) Within 20 days of service as described above, except as otherwise noted in SCR Civ 12, each defendant must respond to the Complaint by filing an Answer or other responsive pleading. **As to any defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in SCR Civ 55(a).** (emphasis added).

In compliance with the Court's Order, on January 27, 1993 the Defendant was served a copy of the summons, complaint, initial order, and alternative dispute resolution form. Since the Defendant was served on January 27, 1993, by the Court's Order of January 22, 1993, the Defendant

was required to file a response **no later than** February 16, 1993.

However, the Defendant deliberately, maliciously, and irresponsibly defied the Court's Order of January 22, 1993, by:

1. Failing or refusing to respond as required by February 16, 1993; and

2. Failing or refusing to request an extension of time to respond, as provided in SCR Civ 55(a).

The Defendant filed an "Answer, Counterclaim And/Or Cross-Claim" on February 18, 1993, two days beyond the due date. Defendant's untimely filing violated District of Columbia Superior Court Rule of Civil Procedure 12(a), and the time to respond was not extended as provided for in Rule of Civil Procedure 55(a). Furthermore, Defendant's untimely filing was in

violation of paragraph (3) of the Court's Order dated January 22, 1993 (Appendix, at A-1 - A-4).

On February 22, 1993, Plaintiff (Petitioner) requested that a default judgment be entered against Respondent. On March 4, 1993, Petitioner filed a response to Respondent's Counterclaim And/Or Cross-Claim Against Plaintiff.

However, though Defendant's (Respondent's) response to the complaint was **untimely**, and though Defendant did not request an extension of time to respond as provided for in Rule of Civil Procedure 55(a), the Court's Clerk denied Petitioner's request for default judgment.

The Defendant's (Respondent's) counterclaim against Petitioner was untimely filed, and Petitioner should not be required to defend against an untimely counterclaim. To deny the default judgment and/or require Petitioner to defend against an untimely counterclaim would

violate Petitioner's rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

On January 31, 1994, the District of Columbia Court of Appeals entered an order denying Petitioner's request for default judgment (Appendix, at A-5 - A-8). On February 14, 1994, Petitioner filed a Petition For Rehearing and Petition For Rehearing En Banc. On April 18, 1994, the District of Columbia Court of Appeals denied Petitioner's Petition For Rehearing and Petition For Rehearing En Banc (Appendix, at A-9 - A-11). This Petition For Writ of Certiorari is filed within ninety (90) days of the denial of the Petition For Rehearing on April 18, 1994. In addition, on May 4, 1994, Petitioner filed a Motion To Stay Mandate pending appeal to the U.S. Supreme Court (Appendix, at A-12 - A13), which was denied on May 13, 1994 (Appendix, at A-14 - A15), since the Court's mandate had already issued on April 26, 1994.

B. MEMORANDUM OF LAW ON DUE PROCESS OF LAW

1. Those matters triable in law or equity under the Common Law of England in 1791 (prior to the adoption of a Bill of Rights to the United States Constitution) are so triable now. When new rights and remedies are created, the action should be analogized to the historical counterpart, in law or in equity, for the purpose of determining the constitutional rights of the party and procedural rights, unless Congress has expressly prescribed the mode of trial or procedure. Parsons v. Bedford, 3 Pet. (28 U.S.) 433, 446, 447, 1830); Slocum v. New York Life Insurance Co., 228 U.S. 364 (1913); Baltimore and Carolina Line v. Dedmon, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

2. We now address the due process question in detail as it applies to this cause. Due process is violated if a practice or rule offends some principle of justice rooted in the tradition and conscience of our people as to be ranked as fundamental. Solesbee v. Balkcom, 339 U.S. 9 (1950). This case further defined due process as that which comports with the deepest notions of what is fair, right and just. This definition raises the question and encompasses the organic Federal law pertaining to the Fifth Amendment: Is the action of the Federal Government under scrutiny in this or any case, fair, right, and just?

3. The content of due process is a historical product. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). The concept of due process is derived from Article 39 of Magna Carta, (1215) which provides:

"No freeman shall be taken or imprisoned, or disseised, or outlawed,

> or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgement of his peers, or by the law of the land."

The phrase "due process of law" first appeared in an English statutory rendition of Article 39 of Magna Carta in 1354. The statute provided: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer any due process of law." 28 Edw. III, C.3. Article 39 of Magna Carta became Article 29 in the Third Reissue of Henry III in 1225. This expansion provided: "No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land." The 1225 reissue also added to Article 29 the language of Article 40 of the original text: "To none will

we sell, to none will we deny, or delay, right or justice." This 1225 reissue became the standard text thereafter. See W. McKechnie, Magna Carta - A Commentary on the Great Charter of King John (Glasgow: 2d rev. ed. 1914).

4. The founders of the American constitutional system derived from Coke the proposition that the term "by law of the land" was equivalent to "due process of law", which Coke, in turn, defined as "by the process of the common law"; that is, by the indictment or presentment of good and lawful men or by writ original of the common law. Sir Edward Coke, Institutes of the Laws of England, Part II (London, 1641, 50-51). The significance of Coke was to extend what was essentially procedural to a concept of substantive restrictions on the English Sovereign. This substantive concept of due process came into fruition in the United States. The term "law of the land", in the early colonial charters, gradually gave way to the term "due

process of law." For example, the 1776 Constitution of Maryland used the language of Magna Carta, including the "law of the land" phrase, in a separate article. Virginia used the clause in a section of guarantees of procedural rights in criminal cases; New York (1821 Constitution) was the first state to use the term "due process of law", as now defined by the United States Constitution. See A. Howard, The Road from Runnymede-Magna Carta and Constitutionalism in America (Charlottesville: 1968).

5. The Supreme Court held in Murray's Lessee v. Hoboken Land Improvement Co., 18 How. (50 U.S. 272, 276, 1856), that the due process clause is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process due process of law by its mere will. All persons within the territory of the United States are entitled to its protection. Sinking Fund Cases,

99 U.S. 700, 719 (1879). Murray's Lessee further held that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it shows the sanction of settled law usage both in England and in this country. The Court further concluded that a court must look not to particular forms of procedure, but to the very substance of individual rights to life, liberty and property. The Court further stated that any legal proceeding enforced by public authority, whether sanctioned by usage or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and presumes those principles of liberty and justice, must be held to be due process of law. Thus, the procedural and substantive aspects of due process were merged into our organic law.

6. The Supreme Court has generally followed the approach of Murray's Lessee, supra. See Twining v. New Jersey, 211 U.S. 78 (1980);

Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319 (1937); and Snyder v. Massachusetts, 291 U.S. 97 (1934). The Supreme Court has further held that due process is to be determined by those canons of decency and fairness which express the notions of justice of English-speaking people. Rochin v. California, 342 U.S. 165, 169 (1952); and further, the Court's idea of fundamental fairness is derived "not alone from the specifics of the Constitution, but also from concepts which are part of the Anglo-American legal heritage." Sniadach v. Family Finance Corp., 395 U.S. 337, 342-343 (1969).

7. See Louisiana ex rel Francis v. Resweber, 312 U.S. 459, 470 (1947), in order to determine whether a given procedure conforms with the consensus of society's opinion, or whether it is fair or just within the confines of "those permanent and pervasive feelings of our society as to which there is compelling

evidence of the kind relevant to judgments on social institutions." In Solesbee v. Balkcom, supra, the Supreme Court utilized four approaches to determine whether a procedure is in compliance with the judgment of society regarding fundamental fairness:

(1) The opinion of the progenitors and architects of American institutions. Twining v. New Jersey, supra; Powell v. Alabama, supra; and Betts v. Brady, 316 U.S. 455 (1942).

(2) The implicit opinions of the policy making organs of state governments. Betts v. Brady, supra; Bute v. Illinois, 333 U.S. 640 (1948); and In re Oliver, 333 U.S. 257, 266-268 (1948).

(3) The explicit opinion of other American courts that have evaluated the fundamentality of a given mode of procedure. Powell v. Alabama, supra; Snyder v. Massachusetts, 291 U.S. 97, (1934); Wolf v. Colorado, 338 U.S. 25, 29 (1949).

(4) The opinions of other countries in the Anglo-American tradition "not less civilized than our own" as reflected in their statutes, decisions and practices. Wolf v. Colorado, supra.

8. In the final analysis, however, it is the judgment of a court hearing a particular case that has specific meaning. Due process is not a mechanical instrument or a yardstick; it is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-163 (1951).

9. There is no precise standard which the Supreme Court of the United States employs to separate civil from criminal sanctions; the Court will look at many factors surrounding the legislative act involved, including the question of whether the sanction involves an affirmative disability or restraint, the history of the legislation, and whether the behavior to which it applies is also a crime, and the possible ends promoted by the penalty. United States v. Ward, 448 U.S. 242 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

10. Before an individual is subjected to restraint or punishments, either criminally or civilly, he must receive a full trial in conformity with the various constitutional safeguards, or waive those rights. The guarantees of the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution restrict the ways in which the Federal Government may investigate, as well as prosecute, someone for a criminal charge. Specifically, the amendments require: (1) Respect for individual rights to privacy and freedom from self-incrimination in the investigative process; (2) That the person not twice be placed in jeopardy for the same offense; (3) Prompt processing of the charges; (4) That the trial of the charges be public; (5) That the charges be tried before an impartial jury; (6) Fair notice of the charges and a chance to prepare a defense; (7) The right to confer and cross-examine witnesses; (8) Compulsory process to obtain favorable witnesses and evidence; (9)

The assistance of counsel; (10) That excessive bail not be used to keep the individual in custody prior to the termination of the prosecution; and (11) That the punishment not be excessive or cruel.

11. In addition to the above mentioned specific rights guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution, the exclusionary rule prohibits use of illegally obtained evidence in furtherance of a criminal prosecution. Mapp v. Ohio, 367 U.S. 643 (1961).

12. Additionally, due process requires that all procedures be fundamentally fair. The process must also conform to the twin guarantees of an impartial determination of guilt or innocence. Mullane v. Wilbur, 421 U.S. 684 (1975); Tumey v. Ohio, 273 U.S. 510 (1927). Additionally, respect must be shown for the dignity of the individual. This requirement is expressed

through the due process clause and has traditionally been used to regulate objectionable police methods. Rochin v. California, 342 U.S. 165 (1952); Turner v. Pennsylvania, 338 U.S. 62 (1949).

13. The following Articles in addition to the other Bill of Rights Amendments to the Constitution of the United States of America, proposed by Congress, and ratified by the several states, pursuant to the Fifth Article of the original Constitution, are applicable in this cause:

> Amendment I
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.
>
> Amendment IV
>
> The right of the people to be secure in their persons, houses, papers and effects, against unreason-

able searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to

have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

14. In addition to the above enumerated Amendments, Movant contends and asserts that the remaining Articles to the Bill of Rights, Amendments (II), (III), (VIII), (IX), and (X), are equally applicable to his cause, if, when and as they may be developed by the pleadings and the evidence.

15. The first Ten Amendments to the Constitution, along with two others which failed of ratification, were proposed by Congress on September 25, 1789, when they passed the Senate, having previously passed the House on September 24, 1789. 1 Annals of Congress 88, 913. Said

Amendments appear officially in 1 Stat. 97. Ratification was completed on December 15, 1791, when the eleventh state (Virginia) approved these amendments, there being then 14 states in the Union. The several state legislatures ratified the first Ten Amendments to the Constitution on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. Thus, the Bill of Rights became the Supreme Law of the Land on December 15, 1791.

16. In Dillon v. Glass, 256 U.S. 368 (1921), the Supreme Court took judicial notice of the date on which a state ratified the Eighteenth Amendment; it therefore, follows that this Honorable Court can likewise take judicial

notice regarding the particular ratifications of the first ten amendments to the United States Constitution.

17. The Supreme Court has held on several occasions that if the Constitution contains no express provision on a subject, that is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. U.S. v. Babbit, 1 Block, 55, 61 (1862); Ex parte Yarbrough, 110 U.S. 651, 658 (1884); McHenry v. Alford, 168 U.S. 651 (1898); South Carolina v. U.S., 199 U.S. 437, 451 (1905); Luria v. U.S., 231 U.S. 9, 24 (1913); The Pesaro, 255 U.S. 216 (1921).

18. Movant contends, asserts and raises at this point the following substantial constitutional question: There can be no negation, impairment, restraint or, otherwise, any restriction or interdiction of Movant's assertion

of any right guaranteed to him under the first Ten Amendments to the United States Constitution. The Bill of Rights is absolute and enumerates and limits the powers of the Federal Government. Therefore, any act of Congress, judicial decree or executive fiat in conflict with the Bill of Rights is a nullity on its face.

19. Chief Justice Marshall classically stated in McCulloch v. Maryland, 4 Wheat. 17 U.S. 316, 405 (1819), the doctrine of enumeration as follows: "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem to be apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending, before the people, found it necessary to urge; that principle is now universally admitted." In U.S. v. Curtiss-Wright Corp., 299 U.S. 304 (1936), the Supreme Court

held that the broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our internal affairs. It is thus well established that the power of our Federal Government is one of limitation and specific enumeration. This principle is so well grounded in our organic law that time and space do not permit further elaboration in this Memorandum of Law. The Court could, indeed, we respectfully contend, take judicial notice of all the principles above set forth in McCulloch v. Maryland and U.S. v. Curtiss-Wright Corp.

20. We now turn our attention to the Bill of Rights. It is not historically clear why the original Constitution did not contain a Bill of

Rights.[1] Perhaps, as asserted by the defenders of the Constitution, when the absence of a Bill of Rights became critical, no bill was needed because Congress was delegated none of the powers such a declaration would deny. This argument probably contributed to the original rejections. Proponents of the Constitution argued that inasmuch as Congress was delegated no power to do those things which a bill of rights would proscribe, said bill of rights was unnecessary and dangerous; and to make certain exceptions to power not granted would thereby provide a basis for claiming more than was granted. The Federalist No. 84 (Modern Library ed. 1937), 555-567 (Hamilton).

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[1] Excerpts from the debate and ratifying conventions is set out in (I) B. Schwartz, The Bill of Rights: A Documentary History (New York: 1971), 435-620; 21 c., 627-980. Movant notes with interest that earlier portions of Volume I trace the origins of the several Bill of Rights Guarantees to the Magna Carta granted by King John of England in 1215 and reissued with alterations in 1216, 1217 and 1225.

Opponents of ratification made the absence of a Bill of Rights a substantial argument and proponents, such as Thomas Jefferson, urged amendment to include a declaration of rights. 12 The Papers of Thomas Jefferson, J. Boyd ed. (Princeton: 1958) 438, 440.

21. Since this cause deals with such profound fundamental personal absolutes contained in the Bill of Rights and is applicable to this Movant's allegations of deprivation and oppression, we have taken the liberty of inquiring into the English Law regarding personal liberties and royal prerogatives. We take this liberty since it is clear that our Bill of Rights (1791) evolved, through the common law, from the English Magna Carta (1215). See note (1), supra. (B. Schwartz).

The Laws of England (The Earl of Halsbury, 1909), Volume 6, pages 371, 372, discusses the Royal Prerogative, which has much relevance and

significance, even today, regarding the relationship between the Movant and the oppressive acts committed by agents of the Federal Government. At page 371, The Laws of England, supra, Halsbury (Section 543) defines the Royal Prerogative:

> "The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of his regal dignity (o), and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England (p)."

The Royal Prerogative was limited as follows: (Halsbury, supra, Sec. 544, page 327):

> "The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogative except such as the law allows (q), nor such as are contrary to Magna Carta, or any other statute (r), or to the liberties of the subject (s). The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative (t), it being a maxim of the common law that Rex non debet esse sub homine,

sed sub Deo et lege, quia lex facit regem(a)."

Thus, it is clear that the liberties guaranteed from and by the Magna Carta (1215) through the English Common Law, by the adoption of our Bill of Rights (1791) to the present day, are absolute and are not subject to interdiction by any act of our Federal Government or its agents.

C. DUE PROCESS REQUIRES THAT PETITIONER BE AWARDED THE RELIEF REQUESTED

Due process requires that the Petitioner be awarded the relief requested. The denial of Petitioner's request for default judgment violates the Petitioner's right of due process of law under the Fifth Amendment to the U.S. Constitution. Similarly, the Court's consideration of Defendant's (Respondent's) **untimely** counterclaim violates Petitioner's right of due process under the Fifth Amendment to the U.S. Constitution.

The process due Petitioner is the process required by fairness, the Court's rules, and the Court's Order in this case dated January 22, 1993 (Appendix, at A-1 - A-4). The Respondent did not respond to the Petitioner's complaint within the time frame prescribed in Rule 12(a), and the Respondent defied the Court's Order dated January 22, 1993. Furthermore, the Respondent did not request an extension of time to respond to the complaint, as provided in Superior Court Rules of Civil Procedure (SCR Civ) 55(a) and as required in the Court's Order. Similarly, the Respondent's counterclaim against Petitioner was untimely filed, and Petitioner should not be required to defend against an untimely counterclaim.

It is only fair and just that the Respondent be required to adhere to the Court's rules and related directives, including the Order

dated January 22, 1993. It is unfair to Petitioner to require anything less.

Petitioner's request for default judgment was not constitutionally and properly denied. A default judgment should have been entered against Respondent. Also, due process and fairness indicate that Petitioner should not be required to defend against an untimely counterclaim. Accordingly, to protect Petitioner's due process rights under the Fifth Amendment to the U.S. Constitution, a default judgment should be entered against Respondent (AFGE), and Respondent's untimely counterclaim against Petitioner should be dismissed with prejudice.

D. EQUAL PROTECTION OF THE LAWS REQUIRES THAT PETITIONER BE AWARDED THE RELIEF REQUESTED

Petitioner's right to equal protection of the laws requires that Petitioner be awarded the relief requested. The denial of Petitioner's request for default judgment violates Petition-

er's right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution. Similarly, the Court's consideration of Defendant's (Respondent's) **untimely** counterclaim violates Petitioner's right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution.

The constitutional concept of equal protection applies in this case because of the differential treatment of Plaintiff (Petitioner) and Defendant (Respondent) in the Court below. The Court's Order dated January 22, 1993 (Appendix, at A-1 - A-4) was **strictly** applied to Petitioner, in that he was required by paragraph (2) of this Order to properly serve the Defendant or face dismissal of his complaint unless the time to serve the Defendant was extended as provided in SCR Civ 4(j). Petitioner dutifully complied with this Order, having Defendant served on January 27, 1993. By this same Order at paragraph (3), Respondent was directed to file a

response within 20 days, or **no later than** February 16, 1993 in this instance. The Order further provided that:

> As to any defendant who has failed to so respond, a default judgment **will** be entered unless the time to respond has been extended as provided in SCR Civ 55(a). (emphasis added).

However, the Defendant deliberately, maliciously, and irresponsibly defied the Court's Order of January 22, 1993, by:

1. Failing or refusing to respond as required by February 16, 1993; and

2. Failing or refusing to request an extension of time to respond, as provided for in the Court's Order, and as provided in SCR Civ 55(a).

The Order at issue (Appendix, at A-1 - A-4) was **strictly** applied by the Court to Petitioner, who carefully complied with its contents. However, the Court violated Petitioner's right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution, by refusing to strictly apply the Order to Respon-

dent by entering a default judgment when they failed to timely respond to the complaint.

The Respondent did not respond to the Petitioner's complaint within the time frame prescribed in Rule 12(a), and defied the Court's Order dated January 22, 1993. Furthermore, the Respondent did not request an extension of time to respond to the complaint, as provided in SCR Civ 55(a) and as required in the Court's Order. Similarly, the Respondent's counterclaim against Petitioner was untimely filed, and equal protection of the laws in this case requires that Petitioner should not be required to defend against an untimely counterclaim.

Equal protection of the laws requires that the Court's Order and related rules be strictly applied to **both** parties, the Defendant (Respondent) and Plaintiff (Petitioner). That was not done, as Respondent was essentially granted

preferential status by the Clerk's failure to enter a default judgment against Respondent.

It is unconstitutional for the Court to enforce its rules and related directives, including the Order dated January 22, 1993, only with respect to Petitioner. This the Court did when Petitioner's request for default judgment was denied.

A default judgment should have been entered against Respondent. Also, equal protection of the laws in this instance indicates that Petitioner should not be required to defend against an untimely counterclaim. Accordingly, to protect Petitioner's right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution, a default judgment should be entered against Respondent (AFGE), and Respondent's untimely counterclaim against Petitioner should be dismissed with prejudice.

CONCLUSION

The Respondent did not respond to the Petitioner's complaint within the time frame prescribed in Rule 12(a), and defied the Court's Order dated January 22, 1993. Furthermore, the Respondent did not request an extension of time to respond to the complaint, as provided in Superior Court Rules of Civil Procedure, (SCR Civ) 55(a). Similarly, the Respondent's counterclaim against Petitioner was untimely filed, and Petitioner should not be required to defend against an untimely counterclaim. To deny the default judgment and/or to require Petitioner to defend against an untimely counterclaim would violate the Fifth and Fourteenth Amendments to the U.S. Constitution. As relief, the Petitioner respectfully requests that the Court issue the Writ and:

1. Direct that a default judgment shall be entered against the Respondent, AFGE, in the amount of $84,028, with interest and costs; and

2. Dismiss with prejudice Respondent's untimely counterclaim against Petitioner.

3. Take such further action as is necessary to assure the fair administration of justice in the Superior Court of the District of Columbia.

Alternatively, the lower Court should be directed to hear Petitioner's claim that he is entitled to a default judgment, and his claim that he should not be required to defend against an untimely counterclaim. The Writ should issue to remedy this unfair situation, and to create order in a chaotic judicial system involving the Superior Court of the District of Columbia.

Respectfully submitted,

Robert Wildberger

Robert W. Wildberger, Jr.
Petitioner, Pro Se
5679 Saffron Lane
Woodbridge, VA 22193

(703) 680-3564

Date: July 15, 1994

INDEX TO APPENDIX

1. Court's Initial Order, dated January 22, 1993 . . . . . A-1

2. Court's Order (District of Columbia Court of Appeals), dated January 31, 1994 A-5

3. Court's Denial of Petition For Rehearing And Rehearing En Banc, dated April 18, 1994 . . . . . A-9

4. Appellant's Motion To Stay Mandate, dated May 4, 1994 . . . . . A-12

5. Court's Denial of Motion For Stay, dated May 13, 1994 . . . . . A-14

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

Wildberger vs. American Fed C.A. No. 93ca00715

INITIAL ORDER

Pursuant to D.C. code §11-906 and District of Columbia Superior Court Rule of Civil Procedure ("SCR Civ") 40-I, it is hereby ORDERED as follows:

(1) Effective this date, this case is assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the Summons, the Complaint, this Initial Order, and a blank

Alternative Dispute Resolution Classification Form. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in SCR Civ 4(j).

(3) Within 20 days of service as described above, except as otherwise noted in SCR Civ 12, each defendant must respond to the Complaint by filing an Answer or other responsive pleading. As to any defendant who has failed to so respond, a default and judgement will be entered unless the time to respond has been extended as provided in SCR Civ 55(a).

(4) At least 20 days prior to the Conference noted below, each defendant must submit to the Court's Multi-Door Dispute Resolution Division (Room 4242) an executed Alternative Dispute Resolution Classification Form.

(5) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an Initial Scheduling and Settlement Conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients prior to the Conference whether the clients are agreeable to binding or non-binding arbitration. This order is the only notice that parties and counsel will receive concerning this Conference.

(6) Upon advice that the date noted below is inconvenient for any party or counsel, the Civil Assignment Office (202) 879-1750 may continue the Conference once, with the consent of all parties, to either of the two succeeding Fridays. No other continuance of the Conference

will be granted except upon motion for good cause shown.

January 22, 1993 Chief Judge Fred B. Ugast

Case Assigned to: Calendar #1 (Judge Robert J. Richter)

Initial Conference: 9:30am 04/23/93

Courtroom: 48-Bldg A, 2nd Floor
515 5th Street, N.W.
Washington, D.C. 20001

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 93-CV-376

ROBERT W. WILDBERGER, APPELLANT,

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
COUNCIL 228 AND LOCAL 2532, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
Civil Division

(Hon. Robert I. Richter, Motions Judge)

(Submitted January 11, 1994
Decided January 31, 1994)

Before KING and SULLIVAN, *Associate judges*, and
BELSON, *Senior Judge*.

ORDER

This case is before the court on the appeal of Robert Wildberger from an order of the Superior Court denying his request for entry of a default judgment against appellees. Mr. Wildberger's request for default was based solely on the ground that appellees filed their answer to his complaint two days late. He also argues that he should not be required to defend against appellees' counterclaim, because it too was late.

Because the denial of appellant's request for default judgment does not constitute a final order, it is not reviewable by this court. D.C. Code § 11-721 (a)(1) (1989 Repl.). The test "for determining whether an order is final for purposes of appeal is whether it dispose of the entire case on the merits." *Crown Oil and Wax Co. of Delaware v. Safeco Ins. Co. of Am.*, 429

A.2d 1376, 1379 (D.C. 1981) (citations omitted). A narrow exception to this test exists where an appellant can show, among other things, that the interlocutory order appealed from is "effectively unreviewable on appeal from a final judgment." *United Methodist Church v. White*, 571 A.2d 790, 792 (D.C. 1990) (citations omitted). The order from which appellant seeks review will be reviewable once the trial court has made a final disposition of the case.

Accordingly, it is

ORDERED that this appeal be, and it hereby is, dismissed.

FOR THE COURT:

William H. Ng
Clerk of the Court

Copies to:

Honorable Robert I. Richter
Clerk, Superior Court

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District of Columbia

Court of Appeals

No. 93-CV-376

ROBERT W. WILDBERGER, JR.,

Appellant,

CA715-93

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 228 AND LOCAL 2532,

Appellee.

BEFORE: +Ferren, Acting Chief Judge; Terry, Steadman, Schwelb, Farrell, Wagner, *King and *Sullivan, Associate Judges; and *Belson, Senior Judge.

O R D E R

On consideration of appellant's petition for rehearing and rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

+Judge Ferren was an Associated Judge of this court at the time of argument. His status changed to Acting Chief Judge on March 18, 1994.

Copies to:

Honorable Robert I. Richter

Clerk, Superior Court

DISTRICT OF COLUMBIA

COURT OF APPEALS

No. 93-CV-376

ROBERT W. WILDBERGER, JR.,

Appellant,

CA715-93

v.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,

Appellee.

MOTION TO STAY MANDATE

Comes now the Appellant in the above-captioned case, and respectfully urges the Court to grant this Motion To Stay Mandate. On April 18, 1994, the court entered an Order

denying appellant's petition for rehearing and rehearing en banc. (Exhibit A).

The Appellant intends to file a Petition For Certiorari in the U.S. Supreme Court concerning the Court's Order dated April 18, 1994. Accordingly, the Appellant hereby urges that the Court stay the mandate in order to allow Appellant time to prepare and file a Petition For Certiorari in the U.S. Supreme Court. See D.C. App. R. 41.

Respectfully submitted,

Date: May 4, 1994 _____

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(703) 680-3564

District of Columbia

Court of Appeals

No. 93-CV-376

ROBERT W. WILDBERGER, JR.,

Appellant,

CA715-93

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Appellee.

BEFORE: King and Sullivan, Associated Judges; and Belson, Senior Judge.

O R D E R

On consideration of appellant's motion to stay mandate, and it appearing that this court's mandate issued on April 26, 1994, it is

ORDERED that the motion is denied as moot.

PER CURIAM.

Copies to:

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